IN THE
SUPREME COURT OF MISSOURI

No. SC 86912

RONNOCO COFFEE COMPANY,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

On Petition for Review from the
Missouri Administrative Hearing Commission
Hon. June Streigel Doughty, Commissioner

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Ronnoco submits this supplemental statement of facts because the Director's statement of facts addresses one of Ronnoco's defenses to the sales and use tax assessments, but fails to address two other defenses to defeat parts of the sales and use tax assessments: (1) that the statute of limitations had run prior to assessments for sales tax periods March 1998 through November 1998, and the assessments of use tax for March, June, and September 1998, and; (2) that the Director's use tax assessments overstated the taxable purchases by over seventy-five percent.[1]

The assessments resulted from an audit that the Director conducted of Ronnoco (L.F.101). The Director issued the assessments on December 13, 2002 (L.F. 103). During the course of the audit, the parties entered into mutual sales and use tax statute of limitation extension agreements that extended the statute of limitations for the Director to issue assessments and for Ronnoco to claim refunds. The earliest unexpired and properly extended waiver agreement was executed on December 28, 2001 (L.F. 101-02). In conjunction with section 144.746,[2] the agreement kept open for assessment and refund all periods that were within the statute for assessment or refund on that date (L.F. 101). Ronnoco filed its sales tax returns for January through November 1998, and the first three quarters' use tax returns for

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[1] As the Commission recognized, these defenses are relevant only if Ronnoco's purchases at issue are not exempt and excluded purchases for resale (L.F. 124-25).

[2] Unless otherwise indicated, all statutory references are to the 2000 Revised Statutes of Missouri.

1998, prior to December 28, 1998, the date three years prior to December 28, 2001 (L.F.94). The Director apparently agreed below that the statute of limitations had run for assessment of these periods (L.F. 124), and the Commission denied Ronnoco's refund claims for those periods for the same reason (L.F. 154 in companion case SC 86724). The Director assessed sales tax of $445.71 for each month March through November 1998 and assessed $1,377.90 in use tax for each month March, June, and September 1998 (L.F. 104-5).

Furthermore, all of the use tax assessments define the assessment period as the last month of each quarter (March, June, September, December) (L.F. 105), but nevertheless assess tax on purchases made in the first two months of each quarter as well (L.F. 28). Seventy-five percent of the purchases the Director held taxable in the use tax assessments were outside of the stated assessment period in the use tax assessments because they were made in the first two months of each quarter (L.F. 28).

STATEMENT OF THE ISSUES

In *Brambles v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998), this Court held that the resale exclusion applied to leases of shipping pallets to Proctor & Gamble for resale in the form of subsequent transfer to and use by its customers that were buying P&G's products shipped on the pallets. In *Weather Guard, Inc. v. Director of Revenue*, 746 S.W.2d 657 (Mo. App. E.D. 1988), the Court of Appeals held that the outright purchase of insulation blowing equipment by retailers who allowed their customers who bought insulation from those retailers to use the machines to install the insulation constituted a purchase for resale. In each case, the court concluded that the requirement to buy products associated with the resold property provided the consideration for resale.

Ronnoco purchased certain coffee equipment, the use of which it transfers to its customers as part of the consideration for continued purchase of Ronnoco's coffee products from Ronnoco. The cost of the equipment is factored into the price that Ronnoco charges for its coffee products. Are those outright purchases of equipment purchases for resale?

STANDARD OF REVIEW

The decision of the Commission shall be upheld unless: (1) it is not authorized by law; (2) it is not supported by competent and substantial evidence upon the whole record; (3) a mandatory procedural safeguard was violated; or (4) it is clearly contrary to the Legislature's reasonable expectations. Section 621.193, RSMo 2000; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996). This Court's review of the law is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000).

Tax imposition statutes shall be strictly construed against the Director in favor of the taxpayer. Section 136.300.1, RSMo 2000; *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 529 (Mo. banc 2003).

POINT RELIED ON

THE COMMISSION DID NOT ERR IN REVERSING THE ASSESSMENTS AT ISSUE BECAUSE, UNDER SECTION 621.189, THAT DECISION IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE RECORD, IS AUTHORIZED BY LAW, AND IS ENTIRELY CONSISTENT WITH THE REASONABLE EXPECTATIONS OF THE MISSOURI GENERAL ASSEMBLY SINCE: (1) RONNOCO PURCHASED THE EQUIPMENT AT ISSUE FOR RESALE AS RONNOCO'S TRANSFER OF THE USE OF THE EQUIPMENT IS A "SALE" WITHIN THE MEANING OF SECTION 144.605(7); (2) PARTS OF THE ASSESSMENT WERE OUTSIDE OF THE STATUTE OF LIMITATIONS; AND (3) THE USE TAX ASSESSMENTS WERE OVERSTATED IN ANY EVENT.

Brambles v. Director of Revenue, 981 S.W.2d 568 (Mo. banc 1998);

Weather Guard, Inc. v. Director of Revenue, 746 S.W.2d 657 (Mo. App. E.D. 1988).

ARGUMENT

THE COMMISSION DID NOT ERR IN REVERSING THE ASSESSMENTS AT ISSUE BECAUSE, UNDER SECTION 621.189, THAT DECISION IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE RECORD, IS AUTHORIZED BY LAW, AND IS ENTIRELY CONSISTENT WITH THE REASONABLE EXPECTATIONS OF THE MISSOURI GENERAL ASSEMBLY SINCE: (1) RONNOCO PURCHASED THE EQUIPMENT AT ISSUE FOR RESALE AS RONNOCO'S TRANSFER OF THE USE OF THE EQUIPMENT IS A "SALE" WITHIN THE MEANING OF SECTION 144.605(7); (2) PARTS OF THE ASSESSMENT WERE OUTSIDE OF THE STATUTE OF LIMITATIONS; AND (3) THE USE TAX ASSESSMENTS WERE OVERSTATED IN ANY EVENT.

1. Ronnoco's Purchases of the Equipment are for Resale Within the Meaning of the Sales/Use Tax Code

A. Introduction

The issue is whether Ronnoco is subject to Missouri sales and use tax on its purchases from both in-state and out-of-state vendors of coffee brewing and grinding equipment and display items like fabric canopies, signage and storage bins (collectively "equipment") that it provided for consideration to its customers for their use. The taxability of Ronnoco's sales are

not at issue since this case neither involves an assessment on Ronnoco's sales nor a refund claim for any tax remitted on sales.[3]

Ronnoco did not use the equipment; rather, it provided the equipment to its customers for their use in either grinding coffee beans or brewing coffee or tea (L.F. 97-8), or, in the case of two grocery store customers, displaying the coffee that was for sale. The consideration that Ronnoco received for granting that use was the continued purchase of Ronnoco's coffee and tea products from Ronnoco. *Id*. The price that Ronnoco charged for the coffee or tea products reflected the cost to Ronnoco of the equipment. The more expensive the equipment that Ronnoco's customers chose, the higher the price Ronnoco charged for the coffee or tea products (L.F. 100). Once Ronnoco's customers ceased buying the coffee or tea products from Ronnoco, they were required to return the equipment (L.F. 98, 100). Thus, Ronnoco's sales were bundled sales consisting of coffee and tea products and the use of the equipment.

Although the taxability of Ronnoco's sales are not at issue in this appeal, Ronnoco collected and remitted sales tax on its bundled sales (of coffee and tea products and equipment)

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[3] While Ronnoco's sales of the equipment at issue could be deemed "loans" (as they are denominated in written contracts), "leases," "rentals," or some other term used to define "sale" under section 144.605(7), Ronnoco's purchases of the equipment at issue were outright purchases of tangible personal property. For this reason, Ronnoco disputes the Director's assertion in the Jurisdictional Statement (Dir. Br. 8) that "[t]he principal question posed on appeal is whether Ronnoco's contracts with its customers are 'leases' as the word is used in §144.020.1(8)[.]"

unless Ronnoco's customers presented Ronnoco with claims of exemption (L.F. 101). During the Tax Periods in question, approximately ninety percent of Ronnoco's sales involving such equipment were to customers that presented claims of exemption to Ronnoco and were thus not charged sales tax by Ronnoco on the bundled sales to them (L.F. 100). The remainder of its customers made no claim of exemption and were charged tax on Ronnoco's sales to them. *Id*. Ronnoco is at a loss to understand why the Director repeatedly claims (Dir. Br. 37-38) that Ronnoco elected not to collect tax on its sales.

Ronnoco owes no sales or use tax on its purchases of equipment at issue because: (1) those purchases are both excluded and exempt from Missouri use tax in that they are purchases for resale within the meaning of sections 144.605, 144.615(6) and 144.610, and excluded from Missouri sales tax by section 144.010.1(10); (2) Ronnoco's purchases of the equipment were for resale under applicable court precedent, and; (3) application of the resale exclusion/exemption in this context is within the reasonable expectations of the General Assembly to avoid multiple taxation. Additionally, as the supplemental statement of facts shows, part of the assessments at issue were beyond the statute of limitations and overstated purchases during the assessment periods by seventy-five percent.

Section 144.610.1 imposes the use tax "for the privilege of storing, using or consuming" tangible personal property in Missouri. A purchase for resale of such property is, however, ***excluded*** from the definitions of storage, use, or consumption under section 144.605 and the dictionary definition of "consume" as the Commission so concluded (L.F. 136). *See Kansas City Royals Baseball Corporation v. Director of Revenue*, 32 S.W.3d 560, 562 (Mo. banc 2000). In a rare exhibition of the "belt and suspenders" approach to legislation, the Missouri General Assembly made its intent doubly clear under the use tax law when it also

provided an ***exemption*** for purchases for resale. *See* section 144.615(6). Missouri's sales tax law excludes resales from the definition of "sale at retail" in section 144.010.1(10), but contains no separate exemption comparable to that found in the use tax law.

A purchase is for resale when it is for "sale" within the meaning of section 144.605(7). *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994). That section defines "sale" broadly as:

> "any transfer, barter or exchange of the title or ownership of tangible personal property, or the right to use, store or consume the same, for a consideration paid or to be paid, and any transaction whether called leases, rentals, bailments, loans, conditional sales or otherwise[.]"

This Court distilled the definition to its three elements: (1) a transfer, barter or exchange; (2) of the title or ownership of tangible personal property or the right to use, store or consume the same; (3) for a consideration paid or to be paid. *Sipco*, 875 S.W.2d at 542.

Ronnoco clearly meets all three elements, none of which the Director disputes. Ronnoco (1) transfers to its customers (2) the right to use, store, or consume the equipment (3) for consideration in the form of continued purchases of coffee and tea products at prices reflecting Ronnoco's cost of the equipment provided. Because the purchases of equipment were both excluded and exempt from use tax and excluded from sales tax, Ronnoco is not subject to tax on those purchases and the Commission correctly abated the assessments of tax on those purchases.

B. Ronnoco's Purchases are for Resale Under Controlling Court Precedent

In *Brambles v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998), the taxpayer bought shipping pallets and leased them to Proctor & Gamble ("P&G"). P&G placed its soap

products on the pallets, applied shrink wrap to the same, and shipped the resulting package to its customers, who were free to use the pallets or return them as they saw fit. This Court specifically rejected the Director's argument that the sales tax exclusion for resales found in section 144.010.1(8)'s definition of "sale at retail" (now section 144.010.1(10)) did not expressly apply to leases of property for re-lease or re-rental because section 144.010.1(3) provides that leases of property are to be taxed in the same manner as outright sales of property. This Court concluded that "to the degree that a lease would be a sale for resale if an outright sale had been made, section 144.010(3) requires that the proceeds from such a lease be excluded from gross receipts." *Id*., 981 S.W.2d at 570.

In *Weather Guard, Inc. v. Director of Revenue*, 746 S.W.2d 657 (Mo. App. E.D. 1988), the taxpayer purchased insulation blowing machines from an out of state vendor and provided the machines to its customers, retailers of the insulation, under a "loan" or "rental" agreement that required the retailers to exclusively buy Weather Guard's insulation and exclusively use the machines to install Weather Guard insulation. *Id.*, 746 S.W.2d at 657-8. The Court of Appeals applied section 144.605's definition of "sale" and concluded that "it is obvious from § 144.605(5) [now section 144.605(7)] that a rental qualifies as a sale."

Each of the above cases applied the words of what is now section 144.605(7), and concluded that the words of the statute clearly and unambiguously state that a resale includes the transfer of the right to use property whether that transfer is labeled a lease, a rental, a bailment or a loan. The label is of no consequence since the transfer is still a "sale" and thus a "resale" for purposes of sections 144.010.1(10), 144.615(6) and 144.605(10) and (13).

C. The Result Is Consistent With the Reasonable Expectations of the General Assembly

In *Sipco*, this Court recognized that both the sales and use tax laws contain exclusions and exemptions that eliminate taxation of the sale or use of property that is to be resold because those exemptions and exclusions "avoid multiple taxation of the same property as it passes through the chain of commerce from producer to wholesaler to distributor to retailer." *Sipco*, 875 S.W.2d at 541. In the case of those customers who do not provide claims of exemption to Ronnoco, Ronnoco collects and remits sales tax on its sales of the coffee/equipment to them. In the case of those customers who do provide claims of exemption to Ronnoco, Ronnoco does not collect and remit sales tax, but those customers collect and remit sales tax on the resulting sales of their coffee and tea products made with or displayed by such equipment (L.F. 75). If the Director's assessments were to stand, Ronnoco would pay tax on its purchase of equipment and collect and remit tax on the subsequent rentals to buyers not claiming exemption, a result inconsistent with the reasonable expectation of the Missouri General Assembly, particularly given its belt and suspenders effort to shield purchases for resale from taxation. *See* Section 621.193.

Furthermore, *Weather Guard* has been the law since 1988 and its rationale was reaffirmed by this Court's decision in *Brambles* in 1998. Sections 144.010, 144.020, 144.605(7) and 144.615 have all been amended at least once since 1998, and yet no amendment attempts to undo either *Weather Guard* or *Brambles*. That action is significant, for it shows that the General Assembly apparently accepts these rulings. *Eighty Hundred Clayton Corporation, d/b/a Tropicana Lanes v. Director of Revenue*, 111 S.W.3d 409, 411, n.3 (Mo. banc 2003).

2. None of the Director's Arguments has Merit

The Director does not dispute any of the foregoing. Consequently, the Court could end its analysis here. However, the Director makes several erroneous and irrelevant arguments in

an attempt to avoid the clear and unambiguous definition of "sale." In particular, while both the exemption and the exclusions rely on a determination that Ronnoco resells the coffee equipment at issue, the exclusions are based upon the definitions of the words of the taxing statute and, as such, are to be construed in favor of Ronnoco and against the Director. *Six Flags*, 102 S.W.3d at 529. The Director's arguments are contrary to the taxing statutes and the cases construing them, and should therefore be rejected.

A. Section 144.020.1(8) is Irrelevant (Responds to Point I, A-C)

The Director wrongly argues that section 144.020.1(8) controls. That paragraph provides:

> 1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state … as follows:
>
> ****
>
> (8) A tax equivalent to four percent of the amount paid or charged for rental or lease of tangible personal property, provided that if the lessor or renter of any tangible personal property had previously purchased the property under the conditions of "sale at retail" as defined in subdivision (8) of section 144.010 and the tax was collected at the time of purchase, the lessor or renter shall not apply or collect the tax on the subsequent lease or rental receipts from that property. …

(i) Section 144.020.1(8) Does Not Apply to Outright Purchases of Tangible Personal Property

Distilled to its essence, the Director's argument is that section 144.020.1(8), under certain circumstances, imposes tax on outright purchases of tangible personal property. While claiming that the "plain language of § 144.020.1(8) demonstrates that Ronnoco's purchases did not qualify for the resale exemption from tax" (Dir. Br. 22), the Director refers this Court to no specific words of section 144.020.1(8) to support that claim. That is because there are no such words. The Director simply states (Dir Br. 23) that section 144.020.1(8) "gives a purchaser … the option of paying tax at the time of purchase, or of collecting tax on the lease of the items purchased, but not both." In fact, it is the interplay between the resale exclusion in section 144.010.1(10) and section 144.020.1(8)'s prior payment exclusion that gives taxpayers the option under the sales tax law.

Ronnoco's purchases from out-of-state vendors is governed by the use tax law. As for Ronnoco's in-state purchases, section 144.020.1(1), although not cited by the Director, is the provision that would impose the tax if tax were due. That paragraph imposes sales tax on "every retail sale in this state of tangible personal property[.]" But the purchases were not "at retail" because they were for resale to Ronnoco's customers. *See* Sections 144.010.1(3) and (10), and *Brambles*.

In *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), this Court concluded that in order to qualify for the resale exclusion under section 144.010.1(10), the subsequent resale had to be one that was ***subject to*** sales tax. Because the country club's sales of meals were not subject to tax, its resales of the food did not qualify it to purchase the food under the resale exclusion. But this Court was careful to distinguish that decision from *McDonnell Douglas Corp. v. Director of Revenue*, 945 S.W.2d 437 (Mo. banc 1997), holding that the resale exclusion applied to subsequent resales that were subject to tax even if an ***exemption***

applied to the resales. There, the resale exclusion applied even though the resales were exempt sales to the federal government. This Court stated that "where aircraft are sold to non-exempt entities, of course a sales or use tax is to be collected on the sale of the final product." *Id*. 6 S.W.3d at 887. ***It is undisputed that Ronnoco charges sales tax on its sales, including its rentals, unless its customers provide claims of exemption*** (L.F. 25, 101). For ten percent of Ronnoco's sales, its customers did not present claims of exemption and Ronnoco collected and remitted tax (L.F. 26).[4] Ronnoco collected no tax on the other ninety percent only because those customers, like the federal government in *McDonnell Douglas*, made claims of exemption. Ronnoco never treated its equipment rentals as excluded from tax as is obvious from its tax collections on sales to customers claiming no exemption. This case is no different than *McDonnell Douglas* in that respect and thus, the *Westwood Country Club* rationale does not disqualify the subsequent sales from entitling Ronnoco to the resale exclusions and exemption on its purchases of the equipment.

Furthermore, if Ronnoco's sales were at issue, and if the Director believed that Ronnoco's customers' claims of exemption on those sales were improper, the law is clear that the Director should address that issue with the customers. Section 32.200, art. V.2, provides that Ronnoco is relieved of liability on such sales when it accepts a claim of exemption in good

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[4] Ronnoco's sister company, Rose Coffee Company, made fifty percent of its sales to customers claiming exemption and collected and remitted tax on the remaining fifty percent of sales. *See Rose Coffee Company v. Director of Revenue*, SC86725 (L.F. 74-5, 130).

faith and section 144.210.1 provides that the Director should pursue the buyers who are making what the Director believes to be an improper claim of exemption.[5]

Moreover, the Director's argument in this regard appears contrary to *Brambles*. P&G's customers were retailers who undoubtedly provided claims of exemption to P&G. Yet, P&G's resales qualified under the resale exclusion such that no tax was due on the leases of the pallets from Brambles to P&G.

The only relevance of section 144.020.1(8) is to rebut the Director's argument that leases and the resale exclusion are mutually exclusive under Missouri law (Dir. Br. 21). Consistent with section 144.605(7)'s definition of sale as including not only outright purchases of property, but also leases and rentals thereof, section 144.020.1(8) states that "[t]angible personal property which is exempt from the sales or use tax upon a sale thereof is likewise exempt from the sales or use tax upon the lease or rental thereof." This clause evidences the legislative intent that leases and rentals be accorded the same treatment as outright sales. Also, as stated above, *Brambles* (for sales tax) and *Weather Guard* (for use tax) directly contradict the

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[5] The record does not support the Director's assumption that Ronnoco's customers' claims of exemption were solely resale claims of exemption. The record provides merely that the customers made claims of exemption (L.F. 25, 44, 101). Moreover, if the Director would choose to explore this issue with those customers, they would have every right to show that their purchases were exempt under any theory. Section 144.210. For instance, the record here shows that Ronnoco sells to restaurants (L.F. 24). They might establish that they use the coffee grinding and brewing equipment to manufacture liquid coffee upon which they collect and remit sales tax.

assertion that resales cannot include rentals or leases. Finally, the Director's claim in this regard flies in the face of the words of the statutes that define the resale exclusions and exemption and the goal of the resale exclusion/exemption to prevent multiple taxation. *Sipco*, 875 S.W.2d at 541.

The Director argues (Dir. Br. 27) that the Commission erred because "Ronnoco chose the 'pay on its purchase' option" under section 144.020.1(8) (Dir Br. 27). The irony of such a claim is hard to ignore given that (a) this appeal concerns the Director's assessment of sales and use tax on Ronnoco's purchases and (b) Ronnoco collects and remits tax on all of the subsequent transfers of the right to use the equipment unless its customers make claims of exemption.

The Director argues (Dir. Br. 38) that Ronnoco cannot invoke both the sales tax resale exclusion and section 144.020.1(8)'s prior payment exclusion simultaneously. Ronnoco has no issue with that assertion. But Ronnoco charges sales tax on all of its sales, including the transfer of the right to use the equipment,[6] unless its customers make a claim of exemption. The Director acknowledges that under section 144.020.1(8) Ronnoco is not required to **both** pay tax on its purchase and collect tax on its transfers of the right to use the equipment, yet that is precisely what the Director's assessments seek to do.

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[6] Ronnoco takes no position on the question whether its transfer of the right to use the equipment is properly and legally labeled a "loan," a "lease," or a "rental" because the characterization of that transfer does not matter under Section 144.605(7). The transfer is a "sale" because it is the transfer of the right to use the equipment and the transfer is for consideration.

The Director cites *Westwood Country Club* and *Six Flags*, but they do not support the Director's assertion. In each case, the taxpayer had paid tax when it acquired the tangible property and charged tax when it leased or rented the property. In each case, this Court concluded that the taxpayer could recover the overpaid tax on the subsequent rental. In each case, this Court recognized the goal of taxing property once and only once. *Six Flags*, 102 S.W.3d at 530; *Westwood*, 6 S.W.3d at 889. In neither case did this Court conclude that the taxpayer must pay tax on all purchases that are resold if any of its customers make claims of exemption.

The Director argues (Dir. Br. 23-24) that section 144.070.5 evidences the General Assembly's intent to generally disqualify purchases for subsequent rental or lease from eligibility as resales. However, the basis for her claim is unclear. First, section 144.020.1(1) expressly taxes retail sales of motor vehicles, trailers, boats and outboard motors as sales of tangible personal property. Second, section 144.020.1(8) provides that the purchase, rental or lease of motor vehicles, trailers, boats and outboard motors shall be taxed under section 144.020 and 144.070. Section 144.070 also addresses the tax on motor vehicles, trailers, boats and outboard motors. The part of section 144.070.5 that the Director cites merely reflects that tax can be paid under section 144.020 or 144.070. Section 144.070.5 is irrelevant because it does not address the issue in this case. Furthermore, nothing in section 144.070 shows an intention contrary to that expressed in section 144.020.1(8) that "[t]angible personal property which is exempt from the sales or use tax upon a sale thereof is likewise exempt from the sales or use tax upon the lease or rental thereof."

The Director cites *International Business Machines Corp v. State Tax Comm'n*, 362 S.W.2d 635 (Mo. 1962) and *Federhofer, Inc. v. Morris*, 364 S.W.2d 524 (Mo. 1963) for the proposition

that leases were not historically subject to sales tax as "sales at retail." The Director thus reasons that leases are not considered "sales" for purposes of determining applicability of the resale exclusions and exemption under current law (Dir. Br. 33-35). Regardless of the validity of her argument about the past, rentals are now subject to sales tax under section 144.020.1(8) while rentals from out-of-state vendors are subject to Missouri use tax as a "sale" under section 144.605(7) and use of property in Missouri. *See Brambles* and *Weather Guard*. There can be little doubt that, absent an exclusion or exemption, the Director expects use tax to be remitted on such rentals from out-of-state vendors. What is good for the goose is good for the gander. If a rental is a sale for purposes of taxability, it is a sale for purposes of determining entitlement to the resale exclusions and exemption.

The Director also advances certain policy arguments (Dir. Br 26-7) that taxpayers would be engaging in "mischief" if they are allowed to elect to pay tax on purchases of leased property, to collect no tax on subsequent rentals, and to then revoke that election by seeking to recover the tax paid at the time of purchase, ultimately resulting in no tax being paid at all. That is not the case here (because this is an appeal of the Director's assessment of tax on purchases) or in the two companion cases. As explained in Ronnoco's brief in the companion cases involving claims for refund, when a taxpayer seeks a refund of tax overpaid on the purchase of property subsequently leased, it is still incumbent on the taxpayer to demonstrate that the subsequent lease is subject to tax. *See Westwood*, 6 S.W.3d at 887-8. In this and the companion cases, the taxpayers collected sales tax on all sales other than to customers making claims of exemption. Likewise, when examining the taxability of the vendor's leases of the property, section 144.020.1(8) requires the vendor to show that it paid the tax at the time of purchase or its rentals are subject to tax. Under any reasonable reading of the statute, that

showing cannot be made if that tax paid at the time of purchase has been refunded. Assuming that Ronnoco's transfers of the use of the equipment are "rentals," it should not be required to also pay tax on its purchases of that property subsequently rented or leased because Ronnoco collects tax on its non-exempt rentals. The only "mischief" about which this Court should concern itself is the Director's attempt to manipulate Missouri statutes to further the Director's apparent goal of double taxation.

B. Section 144.615(6) Applies (Responds to Point I(D))

The Director argues (Dir. Br. 36-7) that the Commission impermissibly applied the express resale ***exemption*** in sections 144.615(6) and 144.605(7) when it should have given section 144.020.1(8) the convoluted and unsupported construction that the Director advanced and, citing *House of Lloyd, Inc. v. Director of Revenue*, 884 S.W.2d 271, 274 (Mo. banc 1994), superimposed that construction on the use tax law. As a preliminary matter, and contrary to the Director's claims, the Commission never held that section 144.615(6) "trumped" section 144.020.1(8). The Commission rightly concluded that section 144.020.1(8) simply did not apply (L.F. 115-7).

As explained above, the Director's construction of section 144.020.1(8) is erroneous. It simply does not apply and if it did, it is entirely consistent with section 144.615(6). In any event, the Director misreads *House of Lloyd*, a case that coincidently addressed the use tax exemption for resale. One issue in *House of Lloyd* was whether packing materials in boxes of the taxpayer's products shipped to its customers were resold to customers. The parties disputed whether the taxpayer "sold" the packing materials since those materials benefited the taxpayer by protecting its products prior to the transfer of title to its customers. This Court noted that section 144.615(6)'s exemption for resale was narrower than the sales tax resale exclusion because the use tax exemption included the words "held solely for resale." But this Court did not, as the Director implies, rewrite the sales tax exclusion to make it narrower. Rather, this Court expanded the use tax exemption by finding that the exemption was not vitiated if the taxpayer received any benefit from holding the packing materials prior to shipment. Thus, even if the sales tax code were narrower than the use tax code in defining resale (which it is not),

this Court has historically resolved such differences in favor of the taxpayer, consistent with the canons of construction.

The Director claims that by equating "resale" with "sale" as defined in section 144.605(7) and considering that section's express inclusion of "rentals" and "leases" within the definition of sale, that various words of section 144.020.1(8) are rendered meaningless (Dir. Br. 38). The Director does not identify the words about which she makes this assertion, although one may presume her focus is on the words "under the conditions of sale at retail." Those words are not rendered meaningless. Ronnoco did not pay tax at the time it purchased the equipment because its purchases were for resale and thus not "at retail." Under the sales tax law, Ronnoco does not owe sales tax under section 144.020.1(1) because its purchase was an excluded purchase for resale under section 144.010.1(3) and (10). *See Brambles*. However, if Ronnoco did not claim the resale exclusion, but rather claimed the prior purchase exclusion in section 144.020.1(8), its purchases of the equipment would be sales at retail and taxable because the subsequent sale of the equipment (loan, lease, or rental) would not be subject to tax. *See Westwood*. No words of section 144.020.1(8) are rendered meaningless. A conflict would certainly arise if a taxpayer who paid both the tax at the time of purchase and collected and remitted tax on the subsequent rental sought to recover both taxes or if a taxpayer asserted that neither its purchase nor the subsequent transfers of use were subject to tax, but that is not the case here.

Last, the Director argues (Dir. Br. 38) that Ronnoco seeks to have it both ways because it accepted exemption certificates from some of its customers and thus did not charge them tax. As explained above, the acceptance of claims of exemption on sales is irrelevant to the resale exclusion on purchases. In *McDonnell Douglas*, the taxpayer still qualified for the resale

exclusion on its purchases even though it resold the property entirely to one exempt entity. And Ronnoco does not seek to have it both ways any more than any vendor does when the vendor accepts a claim of exemption from a customer. Undoubtedly, retailers like Wal-Mart accept claims of exemption from some of their customers. Does that mean that Wal-Mart should not purchase its sales inventory under resale certificates because it would have it "both ways?" If the Director has concern with the claims of exemption made by some of Ronnoco's customers, she is required by sections 144.210.1 and 32.200, art. V.2, to address such concerns with Ronnoco's customers who are making the claims of exemption. Nowhere in the Missouri tax law is the resale exclusion vitiated merely because some, or even all, subsequent sales are exempt. *See* Westwood, 6 S.W.3d at 887.

C. *Brambles* and *Weather Guard* Control (Responds to Point I(E))

The Director makes the perplexing argument that the "factoring cases" cannot apply to determine whether property that is leased is resold because allegedly none of those cases involved leases or involved property that customers had to return (Dir. Br. 39-40). *Brambles* and *Weather Guard* represent such cases. In *Brambles*, this Court expressly applied the factoring analysis to find the consideration for a sale ("It is assumed … that the price of the pallets was factored into the purchase price of the soap and that, therefore, P&G received consideration for those pallets"). *Brambles*, 981 S.W.2d at 571). Weather Guard's customers ultimately **had to return** the insulation blowing equipment. Furthermore, the Court in *Weather Guard*, 746 S.W.2d at 658, expressly relied on what appears to be the first factoring case, *King v. National Super Markets, Inc*., 653 S.W.2d 220 (Mo. banc 1983).

The Director asserts that neither this Court in *Brambles* nor the Court of Appeals in *Weather Guard* considered section 144.020.1(8). They did not do so, nor apparently did the

Director in those cases, because section 144.020.1(8) is inapplicable. But simply because this Court and the Court of Appeals did not consider an irrelevant statute does not mean that *Brambles* and *Weather Guard* are not controlling. They are controlling, just as the Commission concluded.

D. Ronnoco Resells the Equipment; Ronnoco Does Not Otherwise Use or Consume It (Responds to Point II)

The Director's argument in Point II highlights the fact that the taxability of Ronnoco's sales are not at issue. Uncharacteristically, the Director claims that a taxpayer's "sales" of equipment are not taxable. The Director asserts that Ronnoco uses the equipment to provide a "non-taxable support service" (Dir. Br. 43). The Director describes the "nontaxable support service" as "providing its customers with the ability to have freshly-ground and –brewed coffee on demand" (Dir. Br. 45). This argument is contrary to the Commission's finding of fact ¶ 4, which the Director does not overtly challenge, contrary to the sworn testimony in affidavits, and contrary to Missouri law.

The undisputed facts show that Ronnoco transferred the right to use the coffee equipment to its customers for consideration. The undisputed facts show that Ronnoco did not use the equipment. Ronnoco did not grind coffee beans, or brew coffee or tea at its customer's premises; its customers did that. Those facts are found by the Commission (FF ¶ 4, L.F. 97) and sworn to by two separate witnesses (L.F. 24, 43) without any contrary statements in the record. It is, at best, a stretch to take those facts and translate them into the statement

that Ronnoco "tak[es] care of its customer's every service and maintenance need" (Dir. Br. 45).[7]

The Director cites the "true object" test in *Sneary v. Director of Revenue*, 865 S.W.2d 342, 345 (Mo. banc 1993). The Director's reliance on the true-object cases misses the mark because the true object of the transactions clearly is both the equipment and the coffee/tea products. The record is clear that the cost of the equipment is factored into the price of the coffee and tea (FF ¶12, LF 100). If Ronnoco's customers did not want the equipment, then why were they paying extra for it and using it? Indeed, the record shows that some customers do not take coffee equipment because they "want to negotiate a lower price for the coffee beans, ground coffee and tea" (FF ¶13, L.F. 100).

The Director also argues that the equipment could not have been the true object for those customers who provided claims of exemption to Ronnoco (Dir. Br. 47-8). The fact that some of Ronnoco's customers provided claims of exemption to Ronnoco shows nothing more than that those customers claimed that their bundled purchases of coffee/tea products and equipment were exempt. The claims of exemption do not show that the claimants were uninterested in the equipment any more than it shows that they were uninterested in the other aspects of the bundled sale -- the coffee and tea products.

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[7] Having ignored at least part of the record in this case, the Director refers the Court to facts outside of the record, facts that are apparently the result of the Director's counsel's internet search (Dir. Br. 46). Those facts do not support the Director's argument in any event, and Ronnoco objects to this blatant violation of appellate procedure. *See Browning-Ferris Industries of Kansas City, Inc. v. Dance*, 671 S.W.2d 801 (Mo. App. W.D. 1984).

Last, while giving inadequate consideration to Missouri precedent, the Director cites cases from Connecticut and New York that are not controlling or even relevant. In *Sanitary Services Corp. v. Meehan*, 665 A.2d 895 (Conn. 1995), the court determined that waste containers that a trash collection provider placed at its customers' premises were not rented to customers because, factually, trash collection was the true object of the transaction. In *Atlas Linen Supply Co., Inc. v. Chu*, 540 N.Y.S.2d 347 (N.Y. App. Div. 1989), the court determined that clean linens that a laundering service provided to its customers were not rented to customers because, factually, laundry service was the true object of the transaction. Both cases were decided on their facts, and in both cases, the service at issue appeared to be nontaxable. By contrast, Ronnoco agrees that its sales are taxable, and it is clear that Ronnoco's customers do bargain for the equipment or they would not be paying for it. Indeed, the Director practically concedes that the "coffee equipment … is of more than negligible value" (Dir. Br. 47).

E. All of Ronnoco's Equipment Was For Resale (Responds to Point III)

The Director's final point seizes upon the fact that a small part of Ronnoco's equipment purchases were sold outright to its customers, as opposed to transferred under the "loan" agreements, and that the "evidence" does not identify which purchases were transferred in that manner (Dir. Br. 49-50). This is irrelevant because Ronnoco purchased all of the equipment at issue (not just the small amount sold outright) for resale, just as the Commission found. Moreover, even if that were not the case, the Director misplaces her "strict proof" argument. This case was not decided on either a stipulation of facts or a trial. This case was decided on cross "motions for summary determination" under Regulation 1 CSR 15-3.440(3) (L.F. 45-99, 127)(included in Appendix), the Commission's version of this Court's Rule 74.04. Under that summary judgment standard, if there is a dispute as to a material fact, no summary judgment is

to be entered and the case is remanded to the trial court for further proceedings. *See Channing v. Brindley-Sullivan Inc.*, 855 SW.2d 463, 464 (Mo. App. E.D. 1993)("We reverse and remand because a material issue of fact remains in dispute").

The Director's position under Point III is thus erroneous as a matter of fact, law, and procedure.

3. The Assessments Are Outside of the Statute of Limitations Period and are Overstated in Any Event

As the supplemental statement of facts shows, a number of the periods that the Director assessed were assessed more than three years after Ronnoco filed the sales and use tax returns for those periods (L.F. 94), and were not governed by any applicable statute of limitation extension agreement (L.F. 101-2). The statute of limitations is three years. Section 144.220.3. Thus, even if Ronnoco's purchases were subject to tax (they were not), the Director's sales tax assessments for March through November 1998 and use tax assessments for March, June, and September 1998 were time-barred.

Additionally, the use tax assessments were for the last month of each quarter (L.F. 105). More than 75 percent of the purchases assessed during those periods were made other than during those periods (L.F. 28). Section 144.210.3 requires the Director to give the taxpayer written notice of the assessment. The period of the assessment is a key component of such assessment notice. Nothing in the assessments show that the Director is assessing tax for purchases made during the first or second months of each calendar quarter. Although no decisions of this Court have addressed this identical issue, this Court has held taxpayers to a strict notice requirement in the context of refund claims. In *Kansas City Royals*, *supra*, this Court concluded that Royals yearbooks sold outright at concession stands were not included under

the taxpayer's refund claim as purchases for resale, even though the transaction was listed on attachments to the refund claim. The Court applied a strict notice requirement to the claim and concluded that the taxpayer had not explained that the yearbooks were resold outright, as opposed to the resold under the articulated statement of the reasons for refund—that the property was distributed as a promotional item to fans with a paid admission. If a strict notice requirement applies for refund claims, a strict notice requirement should apply to the Director's assessments. Over 75 percent of the use tax assessments are invalid on this basis because the assessed purchases did not take place during the periods that were identified in the assessment notices.

CONCLUSION

Based on the foregoing, this Court should affirm the Commission's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this ____ day of October, 2005, to Alana Barragan-Scott, Assistant Attorney General, Missouri Attorney General's Office, P.O. Box 899, Jefferson City 65102.

I hereby certify that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 7,557 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the briefs has been scanned for viruses and is virus-free.

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